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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 210

HARRY EPSTEIN, IRVING EPSTEIN, AND LENA EPSTEIN, CO-PARTNERS, d/b/a TOP MODE MANUFACTURING CO., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 412-416) is reported at 203 F. 2d 482. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 4a-10a, 11a-75a) are reported at 97 NLRB 1273.

JURISDICTION

The decree of the court below (R. 423-426) was entered on May 19, 1953. The petition for a writ of certiorari was filed on July 27, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 15-16.

QUESTIONS PRESENTED

1. Whether the Board was precluded by the limitations proviso in Section 10(b) of the Act from making any findings with respect to unfair labor practices committed by petitioners after the filing of a charge against them and more than six months prior to the filing of an amended charge, restating and bringing up to date the averments of the original charge, where the intervening unfair labor practices were a continuation of, and of the same class as, those timely averred in the original charge.

2. Whether, in any event, the unfair labor practices to which the foregoing question is immaterial are sufficient to sustain the Board's order in its entirety.

STATEMENT

A. The Board's findings of fact

1. *The unfair labor practices committed prior to the filing and service of the original charge*

On August 29, 1949 the Union (Local 108, International Ladies' Garment Workers Union, A. F.

of L.), having in its possession authorization cards signed by 14 of petitioners' 27 employees constituting an appropriate unit, wrote to petitioners advising them of the Union's majority status and requesting petitioners to bargain collectively (R. 26a-27a; 151a-152a, 365a, 369a-370a). As of September 4, a total of 24 of the employees had signed cards designating the Union as their bargaining representative (R. 27a; 369a-370a). On September 6, 1949, petitioners' attorney, without questioning the Union's majority status, replied to the Union's request for bargaining, stating in substance that petitioners would not recognize the Union until it had been duly certified by the Board, after an election, as bargaining representative of the employees (R. 29a; 366a-377a). On September 7, the Union filed a petition for certification with the Board (R. 29a; 134a-136a, 157a-158a).

On September 6, 1949, the same day that petitioners' counsel advised the Union that it would not be recognized until certified by the Board, petitioners, as the Board found, set about to alienate the employees from the Union and thereby destroy the Union's majority status. Thus, on the morning of September 6, Harry Epstein, one of the firm partners, accused employee Baker of organizing the plant, and threatened that if the Union came in he would reduce the workweek of the cutters and shippers from fifty to forty hours (R. 42a; 263a-265a, 305a). Later that day, or the next, Epstein told employees Yoder and Baker that if the Union was successful he could cut their work to 2 or 3 days per week, and could also close

the plant (R. 43a; 248a-249a). On the afternoon of September 6, Epstein assembled the employees and delivered a speech about the Union, in the course of which he promised that they would soon be put on piece work rates, thereby earning more money (R. 35a, 65a; Tr. 1014). After the meeting, Epstein asked employee Gearheart how he and the other employees felt about the Union and urged him "to be for me" (R. 41a; 213a-215a). Shortly thereafter Epstein asked employee Yoder to inform him concerning the sentiment of other employees toward the Union, and the following morning demanded that Yoder report to him the names of the employees who had attended a Union meeting the previous evening and what had occurred. In the course of the same conversations Epstein requested that Yoder keep him advised concerning the Union's plans, and promised that Yoder would not regret cooperating with him (R. 41a-42a; 241a-245a).

During this period Epstein also urged Baker to induce the employees to vote against the Union in the election; stated to Gearheart that he, Epstein, could control the hours the plant would operate; and, after questioning three employees, Gruver, Singer, and Spangler, about their feelings toward the Union, threatened to close the plant if the Union was successful (R. 42a-44a; 221a-222a, 227a-229a, 275a). On September 19, petitioners put into effect the changeover from the hourly rates to the piece work rates which Epstein had promised on September 6, and on the following

day, September 20, Epstein attempted to have the election postponed so that the employees would have "full opportunity" to realize the improvement he had made in their wages, and "would know exactly what they were voting for" (R. 35a, 37a; 140a, 144a-146a, 163a). During the following week Epstein promised employees Yoder, Gearheart, Baker, and Snow that he would "bend over backwards" for them if they "stuck with him" and give them a raise "when this thing blows over" (R. 7a, 44a; 217a-219a, 242a-243a, 271a-272a, 315a-317a).

On September 28, the Union, after investigating reports concerning the above-described conduct, withdrew its petition for certification and filed a charge [1] against petitioners averring in substance that petitioners had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and Section 8(a)(1) "by other acts and conduct extending over a period from August 31, 1949 to the date hereof, including but not limited to interrogation of employees concerning their union membership, solicitation of employees to act as informers on union activities, promises of benefits to employees, threats of reprisal if the Union should win an election, misrepresentations concerning Union wages, hours and working conditions and other similar acts and conduct too numerous to detail herein * * *." (R. 45a; 143a, 168a-169a, 350a-352a).

[1] The petition (p. 5) states that this charge was served on the employers on October 3, 1949.

2. *Petitioners' continued anti-union campaign after the filing of the original charge*

Following the filing of the charge, petitioners continued, by an almost identical course of conduct, to undermine the Union's status. Thus, about October 21, 1949, Epstein told employee Yoder that he would be rewarded "in the end" if he remained "loyal" to his employers, and at about the same time interrogated employees Baddorf, Bellman, Freeland, and Jacobs as to whether they had received any recent communications from the Union (R. 45a; 233a-234a, 246a-247a, 312a-313a). Shortly thereafter Epstein participated in the preparation of a petition disavowing the Union, which was then circulated among the employees and signed by all of them (R. 46a-47a; 51a; 276a-299a, 371a). And, during a Christmas party held in the plant in December, Epstein told employee Baker that if they had not "done something to stop the Union," the plant would have been closed (R. 51a-52a; 302a-303a). During this period petitioners, in order to keep abreast of the gains won by the Union in other plants, also instituted unilaterally a noncontributory sick benefit plan and a program of paid vacations (R. 52a; 104a-106a; 276a). In February, 1951, petitioners unilaterally granted a general wage increase of 6 percent (R. 52a; 105a-107a).

On April 2, 1951, the Union filed an amended charge which repeated the allegations of the original charge and extended them "to the date hereof" (R. 353a-355a).

B. The Board's conclusions and order

Upon the foregoing findings of fact, the Board concluded that petitioners had violated Section 8(a)(1) and (5) of the Act during the period immediately preceding the filing of the original charge by refusing to bargain collectively with the Union on and after September 6, 1949,[2] interrogating their employees concerning their union activity, threatening to curtail work and to close the plant if the Union was successful, promising benefits to employees if they would cooperate to keep the Union out of the plant, and unilaterally instituting wage increases and improved working conditions (R. 5a-8a, 40a-44a, 56a, 67a-68a). The Board further found that after the filing of the original charge petitioners had persisted in their misconduct violative of Section 8(a)(1) and (5) of the Act by continuing to interrogate employees concerning their union activities, by promising and granting benefits to employees for opposing the Union, and by unilaterally instituting changes in working conditions (R. 68a-69a, 7a).

The Board's order requires petitioners to cease and desist from (R. 8a-9a):

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[2] The Board found that petitioners' insistence upon a Board election to determine the Union's majority status was not prompted by any good faith doubt as to that status but, as petitioners' subsequent illegal conduct demonstrated, by a purpose to take advantage of the intervening time prior to the election to dissipate the Union's majority. The Board accordingly concluded that petitioners' refusal to bargain with the Union on and after September 6, 1949 was violative of the Act (R. 5a-6a, 57a-67a).

> Interrogating their employees concerning their union activities; threatening to cut down their work or shut down the plant, and promising them economic benefits, to discourage their union affiliations and activities; taking unilateral action apart from the statutory bargaining representative of their employees affecting the working conditions of their employees, and in any other manner interfering with, restraining or coercing their employees in the exercise of the rights of self-organization * * *.

The order also requires petitioners to cease and desist from refusing to bargain with the Union upon request, and affirmatively, to bargain when requested to do so (*ibid.*).

C. The decision of the court below

Upon proceedings to enforce the Board's order, the court below granted enforcement in full. It agreed with the Board that petitioners had by their anti-union activities prior to the filing of the original charge engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act and, further, that petitioners had continued to engage in similar misconduct after the filing of that charge (R. 413-415). The court rejected petitioners' contention that the limitations proviso to Section 10(b) of the Act precluded the Board from making any findings with respect to the unfair labor practices occurring after the filing of the original charge (September 28, 1949) and more than six months prior to the filing of the amended

charge (April 2, 1951) (R. 414-415). The court stated that "the complaint in this case could have properly included the matters occurring subsequent to the filing of the charge, for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the same objects" (R. 416). Relying upon this Court's holding in *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 369, "that the Board was empowered to redress 'unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board,' " the court below concluded that the "amendment to the Act does not change that holding" (*ibid.*).

Alternatively, the court held that since the "amended charge alleged acts and conduct similar to those complained of in the original charge * * *, [it was] a verbatim restatement of the original charge * * * extended 'to the date hereof' " (R. 415). Applying the settled rule that a charge is not a pleading, but "merely sets the Board's investigatory powers in motion," the court held that Section 10(b) permits inclusion within the complaint of amended charges—filed after the six-month limitation period—which "relate back" to or "define more precisely" the charges enumerated within the original and timely charge (R. 415-416). The court noted that in this respect its decision differed from that of the Court of Appeals for the Seventh Circuit in *Indiana Metal Products Corp.*

v. *National Labor Relations Board,* 202 F. 2d 613, 619 (R. 415, n. 5).

ARGUMENT

The Board concedes that the ruling below, in sustaining the Board's power to make findings with respect to the unfair labor practices committed after the filing of the original charge and more than six months prior to the filing of the amended charge, is in conflict with the decision of the Court of Appeals for the Seventh Circuit in the *Indiana Metal* case. Although since the enactment of the limitations proviso to Section 10(b) the precise point presented here has been urged before the courts only in these two cases,[3] the issue is a recurring one before the Board and hence of importance in the administration of the Act. Nevertheless, the Board believes that the instant case is inappropriate for the resolution of this question and that the writ should therefore be denied.

For even if the decision below were incorrect on the "narrow ground" (Pet. 5) petitioners urge, the validity of the Board's order as enforced by the court below would remain unimpaired. The Board's findings, approved by the court below,

[3] In *National Labor Relations Board* v. *Harris,* 200 F. 2d 656, 658 (C.A. 5) the court raised the question *sua sponte* and resolved it in accord with the decision below. In *Gaynor News Co.* v. *National Labor Relations Board,* pending reargument, No. 7, this Term, a related question is presented, namely, whether the General Counsel of the Board, consistent with the limitations proviso, may, upon a charge filed by an employee alleging unlawful employer discrimination against him, properly include in the complaint other employees on whose behalf no charges have been filed but who are in a situation similar to that of the charging employee.

with respect to the unfair labor practices committed by petitioners within the six months prior to the filing of the original charge and within the six months prior to the filing of the amended charge fully suffice, we believe, to support the order in its entirety without regard to those findings based upon conduct which may be affected by the limitations proviso. Indeed, the major portion of petitioners' acts and statements found to be violative of the statute occurred immediately prior to the filing of the original charge. As the Board found (*supra*, pp. 2-5, 7), within the six months prior to the filing of the original charge, petitioners, in violation of the Act, refused to bargain collectively with the Union which a majority of the employees had chosen as their bargaining representative; interrogated employees concerning their union activities; threatened economic reprisals if the Union was successful; promised economic benefits to the employees in order to keep the Union out of the plant; and after the Union's request for bargaining, unilaterally instituted changes in employment conditions. Within the six months prior to the filing of the amended charge petitioners, again acting unilaterally, put into effect a general wage increase (*supra*, p. 6).

Except for a passing challenge to the "factual foundation" for these findings (Pet. 9), petitioners do not, and indeed could not, question that these unfair labor practices alone, which were timely charged, constitute sufficient support for the

Board's order in its entirety.[4] The unfair labor practices which occurred after the filing of the original charge and more than six months prior to the filing of the amended charge were merely cumulative or, as the court below observed (R. 416), of the "same class" and "continuations" of the unfair labor practices which were timely averred in the original charge. And, we think, it can be fairly implied from the decisions below (R. 67a-69a, 7a, 414, 416), that both the Board and the Court of Appeals were of the view that the unfair labor practices timely charged by the original and amended charges alone constituted sufficient bases for the order issued by the Board and enforced by the court below.[5] Thus, the court below, making it clear that petitioners had committed all of the

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[4] *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 704-705; *May Dept. Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 385; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 686; *Joy Silk Mills, Inc.*, v. *National Labor Relations Board*, 185 F. 2d 732, 739 (C.A.D.C.), certiorari denied, 341 U.S. 914; *Oughton* v. *National Labor Relations Board*, 118 F. 2d 486, 498-499 (C.A. 3); *National Labor Relations Board* v. *Van Kleeck*, 189 F. 2d 516, 517 (C.A. 2).

[5] To uphold a Board order it is not necessary, of course, for a reviewing court to sustain each and every one of the Board's subsidiary findings. It is enough if the findings which are sustained afford an otherwise adequate basis for the order in its entirety. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 247; *National Labor Relations Board* v. *M. A. Hanna Co.*, 125 F. 2d 786, 789 (C.A. 6); *National Labor Relations Board* v. *Yale & Towne Mfg. Co.*, 114 F. 2d 376, 379 (C.A. 2); *D. H. Holmes Co.* v. *National Labor Relations Board*, 179 F. 2d 876, 879-880 (C.A. 5); *National Labor Relations Board* v. *Minnesota Mining and Mfg. Co.*, 179 F. 2d 323, 326 (C.A. 8); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, decided June 9, 1953, 32 IRRM 2225, 2232 (C.A. 1).

unfair labor practices in question prior to the original charge, declared (R. 414):

> * * * The record here is replete with substantial evidence to support the finding of a lack of bona fide doubt [of the Union's majority]. The time gained by the insistence upon an election was immediately put to use by Epstein to undermine the union. Employees were threatened with economic reprisals, interrogated concerning the union activity, solicited to report union affairs and sentiments, importuned to induce other employees to abandon the union, and promised and granted economic benefits. *After the unfair labor practice charge was filed, the conduct was continued* * * *. [Emphasis added.]

The question of which petitioners seek review, affecting only the continuation of these practices, would, however answered, leave the Board's order intact. The Court, in short, would be unlikely to reach the question as to which a conflict is presented.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

UNFAIR LABOR PRACTICES

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10.

* * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

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